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IN THE

Supreme Court of the United States

October Term, 1947

No.....

MILTON A. FLOYD,
Petitioner (Plaintiff-Appellant below),

vs.

RING CONSTRUCTION CORPORATION, a Corporation, Respondent (Defendant-Appellee below).

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Milton A. Floyd, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, to review a judgment of that Court entered January 8, 1948 (R. 223, f. 226), affirming a judgment of the United States District Court for the District of Minnesota, Fourth Division, entered December 12, 1946, which latter judgment dismissed plaintiff's cause of action (R. 34, f. 41).

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

The petitioner seeks review of a decision of the lower court which denies his right, as plaintiff in the trial court, to a jury trial of factual issues; the Circuit Court of Appeals declaring: "Whether the" trial "court erred in denying a jury trial is immaterial in view of our conclusion that the evidence conclusively established that it would have been the court's duty to direct a verdict for the defendant had the trial been to a jury" (R. 223; 165 Fed. (2d) 131).

As will be more particularly shown hereinafter, the District Court denied plaintiff's seasonable demand for a jury trial on the ground that, although the action was to recover salary under an employment contract, it involved an "adjustment of complicated accounts" (R. 202).

Thereupon, the District Court tried the case as a non-jury case, and made findings of fact upon the contested issues of fact framed by the pleadings, in favor of defendant (R. 27).

Thereafter, the District Court denied plaintiff's motion for a new trial based primarily upon error in denying him a jury trial, on the ground that the denial constituted "harmless error" because the court would have been bound to direct a verdict for the defendant at the close of the evidence, or to set aside a verdict for the plaintiff (R. 203).

The Circuit Court of Appeals without passing on the correctness of plaintiff's assertion that he was entitled to a jury trial, affirmed on the ground that error in denying a jury trial, if it were error, was "immaterial," because the evidence showed a practical construction of the contract and the trial court correctly adopted that construction (R. 222-223).

The Nature of the Case and Rulings Below, Giving This Court Jurisdiction.

Plaintiff's suit seeks recovery of compensation due him under a written employment contract with defendant, to superintend Federal Government construction projects undertaken by defendant during the recent war. Plaintiff was to be paid a stated salary plus *a percentage of the net profits* on construction work that he estimated and supervised (R. 21, f. 24).

The particular work was completed and fully paid for by the Government. The original employment contract (June 3, 1941) specifically defined "net profits," for the purpose of computing plaintiff's compensation, as "the difference between the contractor's price and the total cost of labor * * * (specifying a number of items constituting total cost) * * * except the United States Federal Income Tax only." A modification of the contract signed in September, 1942 (some months *after* the Renegotiation Act of April 28, 1942, was enacted), but dated as of April 1, 1942 (*before* the Renegotiation Act was enacted) explicitly adopted this definition (R. 12). It made no provision that recapture of any part of defendant's profits by the Government in a renegotiation proceeding under that Act should be taken into account in computing plaintiff's compensation; it is silent as to the effect of renegotiation.

This suit proceeds upon a theory that plaintiff was entitled to receive the agreed percentage of defendant's "net profits" shown by the Government's contract settlement with defendant.

Defendant's answer pleaded that when the parties agreed, under the original employment contract of June 3, 1941, that plaintiff's compensation should not become due until the work had been "completed and accepted and full settlement is received" by defendant, it was mutually

intended that "full settlement" should mean one that was *irrevocable;* and that such intention had been "affirmed by the practical construction of the parties," in that plaintiff, until he sued, "acquiesced in the defendant's assertion and claim" that plaintiff's percentage compensation could not "be determined during the pendency of" renegotiation proceedings brought by the Government against defendant (R. 17-18, Par. XIV).

The answer, dated February 16, 1945, having been served, plaintiff demanded a jury trial of all issues triable of right by a jury, February 19, 1945 (R. 20, f. 21). Thereupon, the cause was placed on the docket as a jury action, but on March 16, 1945, after a pre-trial conference, the trial judge "concluded that a right of trial by jury of the issues did not exist under the constitution and statutes of the United States, and thereupon * * * ordered the cause transferred from the jury calendar to the calendar of court actions; with exception allowed to the plaintiff" (R. 27, f. 31).

"Thereupon, the case was fully tried" by the trial judge (R. 27, f. 31), who made findings that literally followed the averments of the answer above summarized, as to what the parties intended by the term "full settlement" and as to plaintiff's alleged acquiescence in defendant's "assertion and claim" as to what the written contract meant (R. 32-33, Finding 17). *Upon those findings,* the trial judge concluded "that the words 'full settlement,' as used in the contract, contemplate determination of the renegotiation proceedings as a condition precedent, and the above entitled action was therefore prematurely brought" (R. 34).

The findings, conclusions of law and order for judgment were filed June 12, 1946 (R. 34) pursuant to the trial judge's first memorandum order, dated June 1, 1946 (R. 21-27).

This memorandum order makes no reference to plaintiff's demand for a jury trial, but the preamble to the findings recites the demand, the original placing of the cause on the jury calendar, and its transfer to the court calendar (R. 27, f. 31).

Plaintiff's motion for new trial, partly based upon the ground "that the Court erred in ordering the above case transferred to the court calendar of non-jury cases, and in trying the case without a jury" (R. 197), was denied December 12, 1946 (R. 201).

The order was accompanied by a second memorandum, dealing wholly with that portion of the motion for new trial based upon denial of a jury trial (R. 201-205). The essential parts of that memorandum read:

> "As it was reasonably inferable from the allegations of the complaint that an *adjustment of complicated accounts between the parties would be necessary, on such basis the court concluded that it was properly triable to the court and not a jury*" (R. 202).
>
> "Even supposing * * * that it was error * * * to have denied the right to a trial by jury, it would amount to a harmless error. * * *
>
> "As applied to the facts before the court * * * it is obvious that *had there been a jury trial the court would have been bound to have instructed the jury to bring in a verdict for the defendant* * * * *and had* * * * *the jury returned a verdict for the plaintiff, the court would then be required to set aside the verdict*" (R. 203). (Italics supplied.)

In this connection, it is to be noted that in his first memorandum order, passing upon the merits of the case, the trial judge laid stress upon the effect of a document signed by plaintiff, as involving an admission on his part, disregarding as being "simply incredible" an explanation by plaintiff that he thought he was signing, *as a witness,* an additional copy of a document which contained no ad-

mission (R. 26). We refer hereinafter to that evidence on the point that it was error to usurp the function of a jury to pass upon the credibility of witnesses.

As bearing upon plaintiff's right to a jury trial, it is to be noted that the trial judge did not rest his decision upon the merits on a theory that the employment contract shows on its face that the amount of plaintiff's compensation is dependent upon the outcome of the renegotiation proceedings. The trial judge declared:

> "It is obvious that when the principal contract between plaintiff and the contractor was executed in 1941 (Exhibit A) the parties could have no intention of any kind concerning the renegotiation act because as stated it was not enacted until April 28, 1942. *It is that fact that causes the contract to be uncertain and ambiguous when an attempt is made to construe it in the light of the subsequent legislation. In such a case it is proper to resort to extrinsic evidence as an aid to construction*" (R. 24-25, f. 28; 66 Fed. Supp. 438). (Italics supplied.)

So, it is clear that the judgment of the trial court rests upon the defense pleaded in Par. XIV of the answer (R. 17-18), that, in carrying into the employment contract (Exhibit B) the provisions of the antecedent contract of 1941 (Exhibit A) as to the measure of plaintiff's compensation,

> "said provision *was intended by both of the parties* to said contract to *mean that no part of the 10% of the net profits was to be payable to the plaintiff until the so-called full settlement had actually and irrevocably been received by the defendant in full settlement, so that the defendant could retain such full settlement as its own without condition; that such intention has been affirmed by the practical construction of the parties hereto, in this:*
>
> *That the plaintiff has at all times up to the time of the commencement of this action acquiesced in the defendant's assertion* and claim made to him by

the defendant with respect to each of the following matters, to-wit:

(a) That no part of the plaintiff's share of the profits on the work done by the defendant in Area C could be determined during the pendency of the said renegotiation proceedings;" etc. (Italics supplied.)

Judgment dismissing the action was entered December 12, 1946 (R. 34, f. 41) and notice of appeal to the Circuit Court of Appeals was served and filed March 10, 1947 (R. 205, f. 904).

The case was submitted to the Circuit Court of Appeals November 5, 1947, and decided and judgment of affirmance entered January 8, 1948 (R. 210-223). Petition for rehearing was denied February 9, 1948 (R. 241, f. 242).

The Lower Court's Decision.

The lower court stated that the decisive question presented by the appeal was "whether the trial court erred in denying the plaintiff-appellant's demand for a jury trial," and, more particularly, "(1) Whether the nature of the action, *as shown by the complaint,* is such as to entitle plaintiff to a jury trial; and (2) if so whether denial * * * was harmless error" (R. 211-212). (Italics supplied.)

The opinion summarized the issues made by the pleadings (R. 212-217) and concluded that the employment contract was ambiguous as to what constituted "full settlement" and "net profits," in the light of the Renegotiation Act (R. 217). The opinion then declared that the case was governed by these principles:

"* * * The terms of a contract, if it be ambiguous, are matters of fact to be determined in the same manner as other facts; by the jury, if it be a jury case, or by the court, *if the jury be waived;* while the construction of the contract and its legal effect are questions of law for the court." (Italics supplied.)

"* * * Where ambiguity exists in a contract the construction the parties in their dealings and by their conduct have placed upon the terms will furnish the court with persuasive evidence of their meaning."

"Ordinarily, if the suit is merely for the recovery of money it is triable at law and a court of equity is without jurisdiction." However, equity may have concurrent jurisdiction in some cases, especially those involving accounts."

"It is also the law, as the trial court concluded, that even though the taking of the case from the jury was error such error was without prejudice and the judgment must be affirmed *provided the evidence was of such conclusive character that it would have been the duty of the court to direct a verdict for the defendant or to set aside the verdict had it been for the plaintiff*. General Tire Co. v. Standard Acc. Ins. Co. (8 Cir.), 65 F. (2d) 236, 239; Empire State Cattle Co. v. Atchison Ry. Co., 210 U. S. 1" (R. 217-219). (Italics supplied.)

Where no doubt exists under the evidence what the fact is, a trial court should direct a verdict (R. 219).

"In order to apply these principles to the * * * pleadings and to the evidence," the court then summarizes the terms of the contract and circumstances attending its performance (R. 219-222). (We shall make more detailed reference to those facts hereinafter.)

That the lower court did not rest its decision wholly upon the terms of the contract itself, but based it upon what the court deemed to be a practical construction adopted by the parties, appears from these concluding statements in the opinion:

"The plaintiff contends here as he did in the District Court that the contract is not ambiguous. We think that *after the enactment of the Renegotiation Act and the execution of the supplemental contract between the parties in 1942 there is sufficient warrant for doubt to justify the admission and con-*

sideration of evidence showing that plaintiff acquiesced in the construction claimed by defendant, contrary to the plaintiff's contention in this suit" (R. 221).

"The construction placed upon the contract by the parties as shown by the evidence is a reasonable construction, and the court did not err in accepting that construction as a correct expression of their intention *after the execution of the supplement thereto in September, 1942"* (R. 222-223). (Italics supplied.)

"Whether the court erred in denying a jury trial is immaterial in view of our conclusion that the evidence conclusively establishes that it would have been the court's duty to direct a verdict for the defendant had the trial been to a jury" (R. 223).

Scope of the Petition for Rehearing Filed Below.

By petition for rehearing, denied Feb. 9, 1948 (R. 241), the petitioner reasserted that he was entitled to a jury trial, *whether the allegations of the complaint or the nature of the issues made by the pleadings and tried and determined by the trial judge be considered* (R. 226). Petitioner, also, reasserted the prejudicial character of error involved in denying him a jury trial, regardless of whether the trial judge could have directed a verdict for defendant had the case been tried to a jury (R. 227-228).

In the petition for rehearing, petitioner, also, challenged the correctness of factual recitals in the opinion of the court below to the effect that the parties had compromised a controversy "in anticipation of a renegotiation proceeding," and that the supplemental agreement between the parties resulted from concern of both parties "about the possible attempt of the War Department to 'renegotiate' the contract" between defendant and the Government (R. 229-230). Petitioner, also, challenged a recital of the opinion that he participated in the renegotiation proceedings (R. 230), and complained of the

infringement of the province of a jury involved in the declaration in the lower court's opinion, that "the construction placed upon the contract by the parties as shown by the evidence, is a *reasonable*" one (R. 230).

Particular attention was drawn in the petition for rehearing to the unsoundness of a conclusion that denial of a jury trial can be deemed to be harmless because of a conception that a jury would have been bound to find against petitioner, and to our position that the lower courts treated as being undisputed important facts that were in dispute (R. 232-238).

JURISDICTIONAL STATEMENT

The following statement discloses the basis upon which the petitioner contends that this court has jurisdiction to review the judgment of the Circuit Court of Appeals:

Statutory Provision Sustaining Jurisdiction.

The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code, as amended by Act of Congress of February 13, 1925, Chap. 229, Sec. 1 (43 Stat. 938; 28 U. S. C. A., Sec. 347).

Constitutional, Statutory and Rule Provisions Involved.

The case involves petitioner's right to a jury trial under the following provisions, respectively, of the United States Constitution, Federal Statutes and Federal Rules of Civil Procedure:

> *U. S. Const., Seventh Amendment:* "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Act of March 3, 1911, Chap. 231, Sec. 291, 36 Stat. 1167; 28 *U. S. C. A.*, Sec. 770: "The trial of issues of fact in the district courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy, shall be by jury."

Fed. Rules Civ. Proc., Rule 38 (a) (b), 28 U. S. C. A., following Sec. 723c: "(a) The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

"(b) Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party."

Date of Judgment Sought to Be Reviewed.

The judgment was entered by the Circuit Court of Appeals January 8, 1948 (R. 223, f. 226), and petition for rehearing in that court was denied February 9, 1948 (R. 241, f. 242).

Indisputably, jurisdiction exists in the federal courts, as to the amount in controversy, etc. (R. 6-7, 28, par. 1).

Opinions of the Courts Below.

The opinion of the District Court, ordering dismissal of the action (June 1, 1946) appears at pages 21-27 of the record, and is reported at 66 Federal Supplement 436. The memorandum accompanying the order denying a new trial and presenting the grounds on which the District Court determined that any error in denying petitioner a jury trial was harmless (December 12, 1946), appears at pages 201-205 of the record.

The opinion of the Circuit Court of Appeals (January 8, 1948) appears at pages 210-223 of the record, and at 165 Fed. (2d) 125-131.

QUESTIONS PRESENTED

1. Was petitioner entitled to a jury trial of right, in the light of the factual issues made by the pleadings and tried and determined by the trial judge? (a) Did the lower courts err in testing petitioner's right to a jury trial by the averments of the complaint, disregarding the factual issues raised by the answer—to which issues the demand for jury trial was directed and which were tried and decided by the trial judge? (b) Was not petitioner entitled to a jury trial, even if his right be tested by the complaint alone?

2. Can erroneous denial of a jury trial, as guaranteed by the Seventh Amendment to the Constitution and the Federal Statutes and Rules, be regarded as immaterial, harmless or nonprejudicial, on a conception of a federal trial judge or an appellate court that the evidence adduced at a trial without a jury so preponderated against the demandant of a jury trial that, had the case been tried to a jury, the trial judge would have been bound to direct a verdict for the prevailing party or to have set aside one returned in the demandant's favor?

3. If error in so denying a jury trial be not so serious as to deprive the trial judge of power or jurisdiction to try factual issues, and if the evidence may be weighed to determine whether a jury could have returned a binding verdict in demandant's favor, does the record in the case at bar make such *affirmative showing* that the error was not prejudicial to petitioner as is required by Judicial Code, Sec. 269, 28 U. S. C. A., Sec. 391?

4. Did the lower court err in affirming a decision of the trial judge that was based upon his conclusion that petitioner's testimony was *incredible,* and hence would not have sustained a binding verdict for petitioner had there been a jury trial?

5. Assuming that the record can be judicially examined to determine whether the evidence so preponderated against petitioner that error in denying him a jury trial was cured or rendered harmless or immaterial, does not the evidence show that questions were presented upon which petitioner was entitled to have a jury pass?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT PRAYED FOR

I.

If the lower court's decision be construed as affirming the trial judge's decision, that it "was reasonably inferable from * * * the complaint that an adjustment of complicated accounts between the parties would be necessary," and that, therefore the cause "was properly triable to the court and not a jury" (R. 202), the decisions of both of the lower courts are in conflict with applicable decisions of this Court and so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The trial judge's intimation that petitioner's right to a jury trial in a federal court was to be determined by decisions of the state court (R. 201, f. 900) is in conflict with an established rule that right to a jury trial is governed by federal decisions.

Ettelson v. Metropolitan Life Ins. Co. (C. C. A. 3, 1943), 137 Fed. (2d) 62, 64-65, cert. den. 320 U. S. 777, 88 L. Ed. 467.

16 *St. John's L. Rev.* 44 (1941).

The answer raised the material factual issues upon which the trial judge decided the case, as shown by an "inspection of the pleadings," and petitioner was and is entitled to a jury trial of those issues.

Slocum v. New York Life Ins. Co. (1912), 228 U. S. 364, 398, 57 L. Ed. 879.

Fed. Rules Civ. Proc., Rule 38 (b), 28 U. S. C. A., following Sec. 723c.

Beaunit Mills, Inc., v. Eday Fabric Sales Corp. (C. C. A. 2, 1942), 124 Fed. (2d) 563.

But the complaint, also, stated a cause of action triable of right by a jury. It stated an action for the recovery of money based upon an employment contract. Computation of petitioner's compensation, based upon transactions between defendant and the Government, would not entail an equitable accounting.

City of Sedalia v. Standard Oil Co. (C. C. A. 8, 1933), 66 Fed. (2d) 757, 761, cert. den. 290 U. S. 706, 78 L. Ed. 607.

It is significant that no accounting was essential in determining the issues tried, and that none was had.

Special School District of Ashdown, Ark., v. Jones (C. C. A. 8, 1918), 250 Fed. 440, 442.

Defendant's counsel conceded in correspondence and at the trial that computation of petitioner's compensation was a simple matter (R. 133, f. 572), that there was "no dispute about the figures" (R. 45), and that computation should be deferred until determination of other questions in the case (R. 46).

Gatudy v. Acme Construction Co. (1938), 196 Wash. 562, 83 Pac. (2d) 889, resembled the case at bar, in that plaintiff sued a construction company for breach of a contract to employ him as a supervisor of one phase of

the work at a monthly salary plus a sum equal to 10% of the net profit derived by the company. There, as here, the trial court denied plaintiff a jury trial, and later adjudged that the action be dismissed. The Washington Supreme Court reversed the judgment with instructions to grant plaintiff's demand for a jury trial.

There being no trust or fiduciary relationship involved, the mere fact that computation of plaintiff's compensation might involve taking accounts does not make this an equity case. "The only relief that could be awarded would be a money judgment, clearly an action at law."

Moore v. Coyne (1906), 113 N. Y. App. Div. 52.

II.

In deciding that, "whether the" trial "court erred in denying a jury trial is immaterial in view of our conclusion that the evidence conclusively establishes that it would have been the court's duty to direct a verdict for the defendant had the trial been to a jury" (R. 223), the Circuit Court of Appeals below decided an important question of federal constitutional and statutory law which has not been, but should be, settled by this Court; and the decision is in conflict with applicable decisions of this Court.

The decision of the lower court rests squarely upon this declaration (R. 218):

> "It is also the law, as the trial court concluded, that even though the taking of the case from the jury was error such error was without prejudice and the judgment must be affirmed provided the evidence was of such conclusive character that it would have been the duty of the court to direct a verdict for the defendant or to set aside the verdict had it been for the plaintiff. General Tire Co. v. Standard Acc. Ins. Co. (8 Cir.), 65 F. (2d) 236, 239; Empire State Cattle Co. v. Atchison Ry. Co., 210 U. S. 1."

The precise point decided by the lower court—that erroneous denial of a jury trial is harmless error if the court's duty would have been to direct or set aside a verdict—has not been passed upon by this Court.

But we respectfully submit that the decision below conflicts with decisions of this Court affirming the fundamental character of the constitutional right to a jury trial.

(a) The decision of the lower court conflicts with the holdings of this court that when a litigant is entitled to a jury trial, error in denying it is fundamental, and deprives the trial judge of jurisdiction to try or determine the facts.

Slocum v. N. Y. Life Ins. Co. (1912), 229 U. S. 364, 398, 57 L. Ed. 879, 894.

Barney v. Schmeider (1869), 9 Wall. 248, 19 L. Ed. 648.

Baltimore & Carolina Line v. Redman (1934), 295 U. S. 654, 657, 79 L. Ed. 1636, 1638.

"Whether the evidence is sufficient to sustain a verdict for one party or the other * * * *does not affect the mode of trial.* * * * *To speak, therefore, of the evidence as determinative of the right to a trial by jury, is to confuse the test or that right with a different test, applicable only in determining whether a particular verdict should be directed.*" (Italics supplied.)

Slocum v. New York Life Ins. Co. (1912), 229 U. S. 364, 398, 57 L. Ed. 879, 894.

In reversing a judgment on a directed verdict, based upon a transcript of testimony taken at a prior trial and *not read to the jury,* this Court decided in *Barney v. Schmeider* (1869), 9 Wall. 248, 19 L. Ed. 648, that there was reversible error, even if the evidence was undisputed.

In following the last cited case in the *Slocum case,* supra, this Court distinguished the functions of trial judge and jury, declaring:

> "Only through the co-operation of the two, each acting within its appropriate sphere, can the constitutional right be satisfied. And so, to dispense with either, or to permit one to disregard the province of the other, is to impinge on that right." (228 U. S. 382, 57 L. Ed. 888.)

As declared in *Baltimore & Carolina Line v. Redman* (1934), 295 U. S. 654, 657, 79 L. Ed. 1636, 1638, the aim of the Seventh Amendment is "particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact * * * by the jury," etc.

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen * * * should be jealously guarded by the courts."
>
> *Jacob v. City of New York* (1941), 315 U. S. 752, 86 L. Ed. 1166, 62 S. Ct. 854.
>
> *Bailey v. Central Vt. R. Co.* (1942), 319 U. S. 356, 87 L. Ed. 1444.

The trial judge having no jurisdiction to try the case without a jury, error in denying a jury trial cannot be validated by application of a supposed rule of harmless error.

The decision of the lower court in applying the rule of harmless error to the erroneous denial of a jury trial conflicts with its own prior decisions.

Special School District of Ashdown, Ark., v. Jones (C. C. A. 8, 1918), 250 Fed. 440.
Issenhuth v. Kirkpatrick (C. C. A. 8, 1919), 258 Fed. 293, 296.
Union Pac. R. Co. v. Syas (C. C. A. 8, 1917), 246 Fed. 561, 568.

In the first two cited cases the lower court reversed judgments for error in transferring the causes to the equity calendar, without considering the state of the evidence.

In the *Ashdown case,* supra, the court declared that "To sustain the jurisdiction of a court of equity over this action would send all litigation concerning building contracts to the chancellor, a result subversive of rights guaranteed by the *law of the land*" (p. 442).

In the *Issenhuth case,* supra, the court said that the error required a new trial because it affected the "substantial right of the defendant to a jury trial in a law action" (p. 296). The court supported its decision by citing *Matter of Simons* (1917), 247 U. S. 231, 62 L. Ed. 1094, in which this Court granted mandamus to require a district judge to allow a jury trial on a count that erroneously had been transferred to the equity docket. That relief was granted to correct wrongful deprivation of her right to a trial by jury,

The decision of the lower court in the case at bar conflicts with its holding in *Union Pac. R. Co. v. Syas,* supra, where it was held to have been prejudicial error to submit an equitable issue to a jury for an advisory verdict. Rejecting a contention that the judgment was just and therefore should not be reversed, the court said that "no judgment is just, if not obtained by due process of law; otherwise, courts could enter judgments without trial."

The decision of the lower court also conflicts with the following decisions of the First and Third Circuits:

Raytheon Mfg. Co. v. Radio Corporation of America (C. C. A. 1, 1935), 76 Fed. 943.

Rettig Beverage Co. v. U. S. (C. C. A. 3, 1926), 13 Fed. (2d) 740, 743.

Error in denying a plaintiff a jury trial of factual *issues raised by the pleadings,* by transferring the cause from law to equity against plaintiff's protest, violates the Seventh Amendment and *"all the subsequent orders made by the court of equity must be extra-jurisdictional."*

Raytheon Mfg. Co. v. Radio Corporation of America, supra.

The judgment in the cited case was affirmed in *Radio Corporation of America v. Raytheon Mfg. Co.* (1935), 296 U. S. 459, 80 L. Ed. 327. Refusing to pass upon the merits of the case, this Court said (296 U. S. 463, 80 L. Ed. 330): "Enough for present purposes that there are issues triable at law, and none triable in equity."

In *Rettig Beverage Co. v. United States, supra,* a decree for plaintiff was reversed because the trial judge applied to the plaintiff's proof in a statutory injunction proceeding, tried without a jury, the weight-of-evidence rule as distinguished from the rule requiring higher degree of proof in equity. The court rejected a contention that the decree should be upheld because it was "right," remarking that if the procedure adopted were wrong, the case was "not properly tried" and the decree was not validly reached.

The two cases cited by the lower court in support of its decision (R. 218), *General Tire Co. v. Standard Acc. Ins. Co.,* 65 Fed. (2d) 237, and *Empire State Cattle Co. v. The Atchison Ry. Co.,* 210 U. S. 1, do not support its conclusion.

Both cases cited by the lower court were tried to juries, and, therefore, the question here presented was not involved. Both cases involved application of the rule concerning waiver of right to a jury's verdict by moving for a directed verdict.

Obviously, in a case like that at bar, there is no room for speculating whether or not, had there been a jury trial, either party would have moved for a directed verdict. And the lower courts overlook the fact that a trial judge cannot direct a verdict of his own motion. Whether defendant would have taken the risks involved in asking for a directed verdict on the evidence adduced at the trial is sheer guesswork.

Giving effect to the Seventh Amendment, the lower court declared in *Minnehaha County, S. D., v. Kelley* (C. C. A. 8, 1945), 150 Fed. (2d) 356, 359-360, that defendant's failure to move for a directed verdict at the close of all of the evidence precludes him from questioning on appeal the sufficiency of the evidence to sustain a verdict for plaintiff.

As to the possibility that a verdict might have been "set aside," that does not show that judgment *non obstante* could have been entered for defendant. Of course, setting aside a verdict for insufficiency of evidence is consistent with grant of a new jury trial.

(b) If the error in denying plaintiff a jury trial was not jurisdictional, the decision below nevertheless conflicts with the holdings of this court, construing Judicial Code, Sec. 269, 28 U. S. C. A., Sec. 391, because the denial affected a substantial right, and it does not affirmatively appear that the error was not prejudicial.

Section 269 "does not change the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record

that it was not prejudicial." (Italics appear in the opinion.)

McCandless v. United States (1935), 298 U. S. 342, 347-348, 80 L. Ed. 1205, 1209.

United States v. River Rouge Imp. Co. (1925), 269 U. S. 411, 70 L. Ed. 339, 346.

"Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

Dimick v. Schiedt (1934), 293 U. S. 474, 79 L. Ed. 603, 611.

The trial court's conclusion of law, that it was harmless error to deny plaintiff a jury trial because of the state of the evidence, so intermingles plaintiff's federal right with findings of fact as to "make it necessary, in order to pass upon the federal question to analyze the facts."

United Gas Public Service Co. v. Texas (1937), 303 U. S. 123, 143, 82 L. Ed. 702, 716.

Chicago Great Western R. Co. v. Rambo (1935), 298 U. S. 99, 101, 80 L. Ed. 1066, 1068.

Erroneous denial of a jury trial violates a *substantial right.*

Martin v. Windsor Hotel Co. (1877), 70 N. Y. 101.

In *Vicksburg & Meridian R. R. Co. v. O'Brien* (1886), 119 U. S. 99, 30 L. Ed. 299, this Court declared that it was well settled that a reversal will be directed unless it appears, beyond reasonable doubt, that the error complained of did not and could not have prejudiced the rights of the party."

It is not enough that the evidence may have *preponderated* against the party relying upon the error. *Smith v. Shoemaker* (1873), 84 U. S. (17 Wall.) 630, 21 L. Ed. 717.

This Court "will for the purpose of determining whether the error found may have been prejudicial, examine the whole record."

Yazoo & Mississippi Valley R. Co. v. Mullins (1918), 249 U. S. 531, 533, 63 L. Ed. 754, 756.

Because the record and the opinions of the lower courts show existence of factual issues, submissible to a jury had one been called, it is unnecessary to determine whether it was correctly decided in *Forster v. Insurance Co. of North America* (C. C. A. 2, 1944), 139 Fed. (2d) 875, 876, that even if the denial of a jury trial is wrong, it is harmless error *where there is "no issue of fact to submit to a jury."* (Italics supplied.)

III.

Assuming, arguendo, that error in denying plaintiff a jury trial would have been harmless had the evidence been such as to require a verdict for defendant, the error is not harmless because the evidence did not so require.

An examination of the opinions will show that in reaching a conclusion that a jury would have been bound to find for defendant, the lower courts, disregarding the exclusive province of a jury, consider the credibility of certain testimony and inferences to be drawn from the evidence direct and circumstantial. In that respect we respectfully submit that prejudicial character of the error in denying a jury trial is intensified.

The principal basis of the trial judge's conclusion is thus stated in his first memorandum (R. 26):

> "The parties here actually signed their supplemental agreement, incorporating the 1941 contract therein by reference, after the renegotiation act had become law. Both parties were well aware of this legislation and were interested in the effect it would

have on defendant's operations. The evidence convinces me that they both understood plaintiff's percentage of profits could not be computed until it was determined what amount of profit defendant would have left after renegotiation and both parties acted accordingly. There was voluminous correspondence over a period of more than a year between plaintiff and defendant or its attorneys from which *the only inference to be drawn* is that plaintiff clearly understood that his compensation was dependent on renegotiation. Plaintiff even gave his advice as to how best to proceed before the renegotiation board and attended a hearing in Washington before that panel. Before defendant made an offer to return a million dollars of his profits he obtained plaintiff's written consent thereto. *Plaintiff's testimony that he did not know what he was doing when he signed this instrument is simply incredible.* No purpose would be served by further reviewing the evidence except to say that at no time from the passage of the renegotiation act in April, 1942, until his complaint was served in February, 1945, did plaintiff ever take the position that he asserts here." (Italics supplied.)

The Circuit Court of Appeals makes a somewhat more detailed summary of evidence which it regarded as important (R. 219-222). Like the trial judge, the lower court stressed inferences to be drawn from the circumstances surrounding the parties but did not refer to countervailing evidence.

We respectfully submit that both courts have disregarded the rules indicated below:

"* * * A district judge may not direct a verdict against a party because he does not credit his testimony, and would, on that account, be disposed to set aside the verdict in his favor."

Lake County v. Massachusetts Bonding & Ins. Co. (C. C. A. 5, 1935, 75 Fed. (2d) 6, 8.

Fidelity & Casualty Co. v. Niemann (C. C. A. 8, 1931), 47 Fed. (2d) 1056, 1060.

In *Kuper v. Betzer* (C. C. A. 8, 1940), 115 Fed. (2d) 842, 844, the court declared that despite a trial judge's opportunity to observe the witnesses, and even when a reading of the record leaves judicial doubt as to the truth of testimony, testimony cannot be disregarded, because neither "this court nor the court below are the judges of the credibility of the witnesses. *That function is the jury's in a case tried to a jury.*" (Italics supplied.)

The power of a trial judge to set aside a verdict and order a new trial is to be distinguished from the power to direct a verdict. Even if it were found that the weight of the evidence were against plaintiff a verdict could not have been directed against him, "for under the constitutional guaranty of trial by jury, it is for the jury to weigh the evidence and pass upon its credibility." Verdict can be directed "only where there is no substantial evidence to support recovery * * * or where the evidence is all against him or so overwhelming as to leave no doubt what the fact is."

Roedegir v. Phillips (C. C. A. 4, 1936), 85 Fed. (2d) 992, 996.

The lower court, in reciting evidence upon which its decision was based, said:

> "Thereafter, a dispute arose between the parties in regard to the amount of estimating plaintiff had done in proving defendant's bid. The controversy was settled about September 1, 1942, *in anticipation of a renegotiation proceeding,*" etc. (R. 213-214). (Italics supplied.)

As pointed out in our petition for rehearing (R. 229) there is nothing in the pleadings, findings, or the trial judge's memorandum to sustain the recital that any settlement was made in anticipation of a renegotiation proceeding. The supplemental agreement signed in September, 1942, settled a collateral controversy but neither

stated nor implied that possible renegotiation was taken into account (R. 9, ff. 7-12).

We also deny that there is anything in the record to sustain the further recital in the lower court's opinion, which was also challenged in the petition for rehearing (R. 231-232):

> "During the summer of 1942 while performance of the contract was in progress *both parties,* the evidence discloses, were *concerned about the possible attempt of the War Department to 'renegotiate' the contract* and to reduce the contract price and recover the excess profits. *This was one of the reasons stated for the making of the supplemental contract in September, 1942, and for dating it as of April 1, 1942*" (R. 219-222). (Italics supplied.)

In referring to the renegotiation proceedings, the lower court's opinion says:

> *"Both plaintiff and defendant participated in these proceedings,* which resulted in the government demanding a *reduction in the contract price* and a return of $1,365,000 as excessive profits" (R. 215). (Italics supplied.)

As shown in our petition for rehearing (R. 230) it is

> "our position that plaintiff did not participate in the renegotiation proceedings in such sense as to imply acquiescence in a view that his compensation was to be computed upon a renegotiated contract price, as distinguished from the original contract price paid in full to defendant."

The opinion, also, says:

> "The construction placed upon the contract by the parties *as shown by the evidence,* is a *reasonable* construction, and the court did not err in accepting that construction as a correct *expression of their intention* after the execution of the supplement thereto in September, 1942" (R. 222-223). (Italics supplied.)

As we stated in our petition for rehearing (R. 230-232):

> "We respectfully submit that this statement necessarily assumes that the evidence presents no conflict as to the intention of the parties, and that, for the reasons stated in Subdivision V, *post,* such an assumption is not justified by the record.
>
> " 'The reasonableness of a contract is a question for the jury *where there is a dispute as to the facts;* but where the facts and circumstances all appear in the testimony, *and there is no conflict in it,* the court may determine the issue. 17 C. J. S. 1270, Sec. 610, n. 17. (Italics supplied.)
>
> "If there was a jury question as to a practical construction placed upon the contract by the parties and a jury had found in plaintiff's favor on that issue, the trial court could not have set the finding aside under a judicial conception as to the reasonableness of the contract so interpreted.
>
> "We respectfully submit that this Court should have recognized that if reasonableness of the contract actually made or intended was a proper subject of inquiry in the lower court, it was the province of a jury to pass upon it in solving the conflict of testimony as to whether or not plaintiff acquiesced in defendant's interpretation.
>
> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because * * * judges feel that other results are more reasonable. Tennant v. Peoria & Pekin Union R. Co. (1943), 321 U. S. 29, 35, 88 L. Ed. 520, 525.' "

It is obvious from the nature of the trial judge's findings (R. 32-33, Finding 17) and from the recitals in the opinions of both lower courts, that the controlling factor was a judicial conception that the evidence conclusively showed that plaintiff *acquiesced* in defendant's interpretation of the contract, by reason of what he said and did, after the written agreement was entered into.

We repeat the assertion made in the petition for rehearing (R. 233) that there was a jury question on that factual issue.

> "Contractual intention is a fact question for a jury, when not clearly expressed by mutually adopted language."
> 17 *C. J. S.* 1283, Sec. 616.

The lower court attached considerable, if not controlling, weight to Plaintiff's Exhibit Trial 13 (R. 106-108) and particularly those parts quoted in the opinion (R. 220-221). But, as noted in our petition for rehearing (R. 234), the recitals of the letter, which are covered by a notation of plaintiff's acceptance and agreement, do not specify that any part of plaintiff's compensation other than a monthly sum, as distinguished from his percentage compensation, was to depend upon outcome of renegotiation proceedings. The recital in the letter that "unfortunately" the Renegotiation Act might "affect your *position* as well as the *position* of our company" does not necessarily indicate that plaintiff's compensation under his contract with defendant would be affected. Certainly, an ambiguous contract cannot be deemed to have been rendered certain by a practical construction depending upon such supplemental ambiguity.

The essence of Exhibit 13, supra, seems to lie in an understanding that there should be reimbursement of defendant by plaintiff to the extent that the aggregate of the $3,500 monthly payments provided for in the contract, is "in excess of 10% of the net profits earned by our company *to which you are entitled under the provisions of your employment contract with us,*" but only in the event the $3,500 monthly payments were disallowed as a job cost. So, instead of showing acquiescence by plaintiff in defendant's present claim as to what the contract of employment meant, the letter leaves the contract

just as ambiguous as it was before the letter was written, so far as concerns the question in controversy.

The lower court also seems to attach controlling importance to evidence thus summarized in its opinion (R. 221):

> "For instance, the evidence shows that the defendant on November 30, 1942, offered to settle with the War Department and to modify the contract by reducing the contract price in the amount of $1,000,000. The following notation in handwriting was added to the second page of the offer and signed by plaintiff: 'The undersigned hereby approve and consent to the modification of the contract as hereinabove provided.' "

The lower court made no reference to plaintiff's explanation, which we give below, to the effect that he thought he was merely signing an additional copy of the offer *as a witness* and did not know or notice that the notation of consent and approval above quoted had been inserted on that copy.

This relates to the same testimony of the plaintiff which the trial judge dismissed from consideration as being "simply incredible" (R. 26).

As argued in our brief below, to which reference was made in our petition for rehearing (R. 235):

> "We respectfully suggest that a jury reasonably could have believed plaintiff's explanation that he believed that he was merely signing a sixth copy as a witness, as he had signed the other five copies as shown by the summary of his evidence at page 54 of the record:
>
> "He affixed his signature on Defendant's Exhibit Trial A the same day as he and Wiik witnessed the other five copies, in Ring's office; Ring simply asked him 'to witness these renegotiation documents' (585-586); after he signed as a witness, Wiik came back and told him he had missed one, and he went back to Ring's office and signed another; he didn't notice the

notation on the sixth copy and it was never called to his attention until his deposition was taken, and he thought that he was simply witnessing the document (584-589); he knew that he signed one paper on the side and one on the bottom, but asked no question about it (471-472); he did not read the documents (588)."

Although the lower court's opinion does not cite or comment upon any evidence offered by plaintiff, it does recite (R. 222):

> "In all the negotiations and correspondence between the parties the plaintiff at no time disputed the interpretation placed upon the contract by the defendant until about the time this suit was commenced, but on the other hand, acquiesced therein as shown by his letter, supra."

This passage of the opinion is to be read with the preceding recital (R. 220):

> "Prior to the completion of the performance of the contract with the War Department no controversy arose in regard to the interpretation of the contract of employment between the parties. *In fact no dispute arose on the point until this action was commenced.*" (Italics supplied.)

As pointed out in our petition for rehearing, it is obvious that until defendant asserted that plaintiff's compensation was dependent upon the outcome of renegotiation proceedings against defendant, plaintiff's silence could not be regarded as acquiescence. It is equally clear that vague and ambiguous declarations by defendant should not be regarded as establishing an assertion on its part.

There was evidence from which a jury could find that not until December, 1943, did plaintiff learn that defendant asserted that his compensation would be affected by the renegotiation proceedings (R. 52-57). And, of course,

plaintiff's mere knowledge as to what defendant *asserted* was not the equivalent of acquiescence in the assertion.

Without undertaking to detail all the evidence tending to disprove defendant's assertion of practical construction of the employment contract through plaintiff's acquiescence, we point out that plaintiff maintained that not until December, 1943, did he learn that defendant was claiming that his compensation would be affected by renegotiation proceedings (R. 52-57); that until then he supposed that the subject-matter of discussion by defendant was only whether the renegotiating authorities were going to allow his compensation as one of the "project costs" for the purpose of determining the amount of allowable profit (R. 54-56), or whether defendant would have to pay it "out of the profits allowed to the contractor" as indicated to him in letter of February 8, 1943 (Def. Ex. Tr. B, R. 145-147); that he was attempting to get a temporary settlement (R. 60-61), so that he could pay his income taxes (Dft. Ex. Tr. H, R. 156-157; Dft. Ex. Tr. GG, R. 188; Dft. Ex. Tr. EE, R. 182-184), and that he never agreed to share in any renegotiation refund. Whether his assertion was borne out by the voluminous correspondence or was impeached by it, was obviously a question for the jury.

Ten months before the suit was brought, plaintiff wrote to defendant's attorney:

> "The Ring Construction Corporation has received full payment from the Government, which constituted acceptance of the work. The terms of my contract with Ring do not provide for any further exceptions" (R. 191).

In the same letter plaintiff stated that he did not know whether it had occurred to the latter that "the renegotiation affair" could concern plaintiff "very little."

The lower court stresses the fact (R. 222):

> "As late as June 13, 1944, he—plaintiff—wrote, 'I still feel and always shall feel that I am entitled to the share of my money, computed on the profit not in controversy with the War Board.'" (See Defendant's Exhibit Trial J, R. 160-161.)

Could not a jury have found, in the light of the surrounding circumstances and the full context of the exhibit, that plaintiff merely asked for a present payment of what he regarded as being presently computable, under defendant's theory that the compensation would be reducible according to the outcome of the renegotiation proceedings—leaving for future adjustment or litigation the dispute as to whether the compensation was so reducible?

The opinion of the lower court makes no reference to the defendant's attitude expressed toward the employment contract in defendant's dealing with the Government in making income tax returns and in the renegotiation proceedings. As shown by our petition for rehearing (R. 237-238) in referring to our brief filed below, the defendant adopted in its dealings with the Government a theory as to plaintiff's contractual rights that is consistent with plaintiff's claim in this suit and inconsistent with defendant's present theory. We do not assert that such inconsistency alone settles the issues in this case, but we do submit that it constitutes evidence to be weighed in a balance by a jury.

In fact, the record abounds with proof, ignored by both of the lower courts in their decisions, of a "practical construction" by defendant, amounting to a recognition of plaintiff's claim as asserted in this action. Such proof relates, as indicated, to defendant's conduct in returning its taxable income, and in dealing with the renegotiating authorities. It is only necessary to summarize that proof, in order to demonstrate that there were serious issues for the jury's determination.

In November, 1942, when the job was practically completed, defendant as a first step in renegotiation, filed a verified "Final Report of Project Costs" (Pl. Ex. Tr. 20, R. 115-117) with the War Department, in response to its request. Therein, defendant showed, as of November 1, 1942, "total job costs," according to its books, amounting to $5,122,298.04 (R. 116), as compared to a revised contract price of $6,831,504.76 (R. 115), and a resultant "gross job profit" of $1,870,284.17 (R. 116), subject to adjustment for cost of completion estimated at $25,000.00 (R. 117). Among the items of job costs was an item of $235,827.45 for "supervisory labor" (R. 115). That item included a figure of $112,678.60 for plaintiff's compensation (Pl. Ex. Tr. 21, R. 118), computed on the basis of 6% of the entire job profit, as the equivalent of 10% of the profits on Area C (R. 48). The item for "supervisory labor" was entered advisedly, with the assistance of defendant's counsel (R. 47-48, 68). Defendant and its representatives knew that any action taken by the renegotiating authorities would be based upon the report (Pl. Ex. Tr. 42, R. 143-144).

Before the end of 1942, defendant received around $5,000,000 on its contract, and received the balance in 1943.

November 30, 1942, after a visit from several War Department representatives, defendant submitted a written offer to the War Department to refund $1,000,000 as excessive profits (Pl. Ex. Tr. 6, R. 84-86; Pl. Ex. Tr. 40, R. 140).

While this offer was pending, on March 15, 1943, defendant filed federal tax returns for 1942 (Pl. Ex. Tr. 5, R. 79-80). It set up against the job a million dollar reserve to cover its offer (R. 80), and deducted that amount from its job profit (R. 39-40). Without consulting or notifying plaintiff, it returned plaintiff's compensation at $53,318.74, on the basis of that reduced job profit.

Meanwhile, defendant performed a separate contract with the Government to erect WAC barracks, wholly unrelated to its contract which plaintiff estimated. Plaintiff had nothing to do with that project (R. 39), and had no claim on it.

May 26, 1943, the War Department rejected defendant's million dollar offer (Dft. Ex. Tr. R, R. 169). Later, September, 1943, a panel hearing before the price adjustment board in Washington resulted in a determination that of the profits received by defendant from its contract on Areas C and E *and* its separate contract for the WAC barracks, $1,365,000 represented excessive profits. The board allowed, as a deductible project cost, $14,000 for plaintiff's compensation (R. 102), noting in its statement of the basis of its determination (R. 103), that for such supervisory labor "any additional compensation is to be covered by the gross profit" (Ex. E attached to Pl. Ex. Tr. 9, R. 101-103, or Pl. Ex. Tr. 32, R. 127-129). In other words, the board was not concerned with the amount of plaintiff's contract compensation, but only with the question of how much of that compensation should be allowed as a job cost, since the Renegotiation Act in Sec. 403 (d) provided that compensation to an employee should not be allowed in more than a reasonable amount. How the contractor shared its profits, was none of the board's concern. Whether or not plaintiff's compensation was allowable in whole or in part, as a reasonable project cost, does not affect his claim under his contract.

In November, 1943, defendant filed amended federal tax returns for 1942, reporting its actual job profit, by eliminating the deduction on account of the million dollar offer, and setting up an item of "Additional Compensation" due plaintiff of $53,501.17, over and above the $53,318.74 reported in its original returns, or a total of $106,819.91 (Pl. Ex. Tr. 5, R. 81-83, R. 40). This figure

was only a little less than the amount included for plaintiff's compensation in defendant's "Final Report of Project Costs" submitted to the War Department. A schedule prepared by defendant's auditors shows the computation of plaintiff's "Additional Compensation" in detail (Pl. Ex. Tr. 24, R. 118-119).

The amended returns were made advisedly after consultation with defendant's counsel and auditors (R. 70). Defendant paid its full tax on the basis of the amended returns.

About the same time, defendant's counsel advised the board in Washington that defendant rejected its determination, and excepted thereto on the specific ground that the board should have allowed plaintiff's compensation in full as a project cost. In a letter to the board November 11, 1943 (Pl. Ex. Tr. 39, R. 138), defendant's counsel pointed out:

> "We believe that you have allowed insufficient overhead expense, especially by way of salary to Mr. Ring, Mr. Wiik and Mr. Floyd. We believe that you have been incorrect in your failure to recognize the fact that these employees of the company *must be paid the agreed compensation regardless of your view as to the reasonableness thereof*" (R. 138). (Italics supplied.)

Thereupon, the renegotiation matter was referred to the Under Secretary of War, who affirmed the board's determination by order of December 20, 1943 (Exhibits A and B attached to Pl. Ex. Tr. 9, R. 96-98, Ex. C attached to answer, R. 19). The order directed defendant "to repay such excessive profits ($1,365,000) less * * * tax credit," on account of Areas C, E, *and* G. The treasury notified defendant of its offsetting tax credit (Ex. C attached to Pl. Ex. Tr. 9, R. 98-99).

Defendant petitioned The Tax Court for review (Pl. Ex. Tr. 9, R. 90-105). In its verified petition, it alleged (R. 93-94):

"That the respondents failed to allow credit to the petitioner for *definite and reasonable obligations owing by it in the performance of said contract to* its president, M. J. Ring, and to several of its key employees, to-wit: Martin Ring, Vera Ring, *M. A. Floyd,* A. I. Wiik, and Harold Ring. * * *

"That hereto attached, marked Exhibit 'D' and made a part hereof, is a true and correct statement of the income derived by the petitioner from said contracts and of the expenses in connection with the performance thereof set up in the several general classifications usual in such matters, together with the net profit derived from the performance of said contracts" (R. 93, 94). (Italics supplied.)

Exhibit D, entitled "Summary Schedule of Income and Expenses, Camp McCoy Contract, 1942 and 1943," contains an entry (R. 99):

"M. A. Floyd compensation * * * $110,275.32" (R. 99),

representing plaintiff's percentage without reference to renegotiation (R. 41).

Thus, it appears that the petition is based upon a recognized obligation to plaintiff for the very amount which plaintiff claims and defendant now denies. This is borne out by the letter from defendant's counsel to plaintiff, notifying him that the petition is being filed:

"If you desire a copy of our Petition to The Tax Court of the United States, will you please advise and we will have one run off for you. I do not think the details will be of any particular interest to you. You will be interested to know, however, that *we set up the obligation under the contract with you in full as legitimate expense*" (Pl. Ex. Tr. 16, R. 110-111). (Italics supplied.)

At the time of the trial of this case and the decision and judgment below, the renegotiation matter was still pending before The Tax Court.

In all of the above mentioned proceedings, defendant took a position contrary to its present claim. Those proceedings cannot be treated as isolated declarations. On the contrary, they represent a consistent position which the defendant took in dealing with the Government during the entire period from November, 1942. The present denial of plaintiff's claim in this case is a complete "about-face." Furthermore, the admissions made by the defendant were made, many of them, under oath, and with the advice of counsel and expert auditors, and advisedly, and were designed to affect the vital financial position of the defendant.

The lower court also seems to have left out of consideration a point to which a jury might have attached considerable importance, as bearing upon the probability that plaintiff assented to defendant's interpretation of the employment contract. We drew attention in our original brief and the petition for rehearing (R. 238) that defendant's interpretation would give him an unjust windfall to plaintiff's prejudice because:

Against a renegotiation award of $1,365,000, made against defendant, the Government allowed defendant an "offsetting tax credit" that, in effect, reduced the renegotiation award from $1,365,000 to $293,824.24. Notice of the offsetting tax credit appears as an exhibit attached to defendant's petition to The Tax Court (Ex. C attached to Pl. Ex. Tr. 9, R. 98-99). *Int. Rev. Code,* Sec. 3806(b), provides, in substance, that the amount by which the income tax would have been reduced on the hypothesis that the excessive profits required to be refunded had never become a part of income, should be credited against the excessive profits to be refunded.

Under the contract in suit, plaintiff's percentage compensation is to be measured by defendant's "net profits" before "the U. S. Federal Income Tax." Had there been no renegotiation, defendant could not have deducted any

of its 1942 federal income taxes in arriving at its "net profits." Plaintiff's compensation would be determined without deducting from defendant's profits, any federal income taxes, whether normal, surtax, declared value excess-profits tax, or excess-profits tax. To allow defendant to deduct the amount of a renegotiation refund from its "net profits" before measuring plaintiff's compensation, would be in effect to compel plaintiff to pay a portion of defendant's federal income taxes.

PRAYER FOR WRIT

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that judgment of the Circuit Court of Appeals be reversed by this Honorable Court, and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated May 1, 1948.

BENEDICT DEINARD,
1036 Andrus Building,
Minneapolis, Minnesota,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1947

No.....

MILTON A. FLOYD,
Petitioner (Plaintiff-Appellant below),

vs.

RING CONSTRUCTION CORPORATION, a Corporation, Respondent (Defendant-Appellee below).

BRIEF IN SUPPORT OF PRECEDING PETITION

ARGUMENT

Summarizing reasons stated in the petition, we respectfully submit that the writ prayed for should be granted because:

The case presents an important question of constitutional law that has not been, but obviously should be, settled by this Court: Is there to be read into the Seventh Amendment, by judicial interpretation, an implied qualification to the effect that violation of the right to a jury trial is cured if a district judge or an appellate court concludes, upon an examination of the evidence, that a jury could not have reached a binding verdict in favor of the party demanding a jury trial?

Although the question has not been settled by the Court, there are many declarations in the Court's opinions that are inconsistent with the theory adopted by the lower courts that denial of a jury trial falls within the doctrine of harmless error.

To ask the Court to apply analogies found in its decisions to strengthen the constitutional right to a jury trial is consistent with the Court's declared disinclination to

weaken the right by *stretching* analogies. (*Dimick v. Schiedt* (1934), 293 U. S. 474, 485, 79 L. Ed. 603, 610.)

We invoke that declaration as refuting the reasoning of the lower courts that, because in a proper case *that has been tried to a jury* a verdict may be controlled by a judicial conception that there is no basis to support a finding for one of the parties, by analogy, the *denial of a jury trial* is to be regarded as immaterial under a similar state of proof.

At least, in a case like that at bar, where it is attempted to excuse error in denying a jury trial on the ground that direct and circumstantial evidence, and inferences to be drawn therefrom, presented by demandant of a jury trial could not have been accorded weight and credibility, the excuse should be declared invalid in the light of what this Court said in *Berry v. United States* (1940), 312 U. S. 450, 452, 85 L. Ed. 945, 947. Referring to the old practice recognized in *Slocum v. New York Life Ins. Co.* (1912), 228 U. S. 364, 57 L. Ed. 879, this Court said:

> "Rule 50(b)" of the Rules of Civil Procedure "goes further than the old practice in that district judges, under certain circumstances, are now expressly declared to have the right (but not the mandatory duty) to enter a judgment contrary to the jury's verdict without granting a new trial. But that rule has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact—a jury being the constitutional tribunal provided for trying facts in courts of law."

So whether error in denying a jury trial is prejudicial should not be tested by the power of a trial judge to set aside a verdict and enter judgment *non obstante,* because the Circuit Court or this Court, on review, might reverse the judgment and order judgment entered on the verdict. *A fortiori,* the harmfulness of the error is not to be tested by a trial judge's power to grant a new jury trial.

The lower court, disregarding evidence tending to show that the petitioner never acquiesced in defendant's interpretation of the employment contract, declared: "The construction placed upon the contract by the parties *as shown by the evidence* is a *reasonable* construction" (R. 221-223). (Italics supplied.) Upon that premise, the Court concluded that had a jury tried the case it could not have made a binding finding for petitioner. That conclusion is at variance with the declaration of this Court:

> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because * * * judges feel that other results are more reasonable."
>
> *Tennant v. Peoria & Pekin Union R. Co.* (1943), 321 U. S. 29, 35, 88 L. Ed. 520, 525.

We find nothing in the majority opinion in *Galloway v. United States* (1942), 319 U. S. 372, 87 L. Ed. 1458, that derogates from the declaration in the dissenting opinion, in which Mr. Justice Black said (Messrs. Justice Douglas and Murphy concurring):

> "* * * A verdict should be directed, if at all, only when, *without weighing the credibility of the witnesses,* there is in the evidence *no room whatever for honest difference of opinion over the factual issue in controversy.*" (319 U. S. 407, 87 L. Ed. 1480.) (Italics supplied.)

Had the lower court decided that no error was committed in denying plaintiff's demand for a jury trial, we should have regarded it as being incumbent upon us to make an exhaustive showing that the pleadings and the factual issues tried and determined by the trial judge were such as to leave him no discretion to deny the demand for a jury. We rely upon such showing in that regard as appears under Point I of the "Reasons Relied on for the Allowance of the Writ Prayed for," in the preceding petition, as being adequate in the light of the lower court's omission to declare that the denial was not

error, and in the light of its declaration that "Whether the court erred in denying a jury trial is immaterial in view of our conclusion that the evidence conclusively establishes that it would have been the court's duty to direct a verdict for the defendant had the trial been to a jury" (R. 223). To the same effect was the conclusion of the trial judge (R. 203, f. 902).

Under Point II(a) we have attempted to demonstrate that the error was fatal to the trial judge's right to try the facts. If we are right on that point, no examination of the evidence is required to establish our right to a reversal of the decisions of the lower courts.

If this Court should regard the case as being one to which Judicial Code, Sec. 269, 28 U. S. C. A., Sec. 391, applies, as potentially involving violation of a substantial right, we respectfully submit that no burden rests upon us to show prejudice. If right to a jury trial is a substantial right, within Section 269, then does it not necessarily follow that it was reversible error "unless it *affirmatively* appear from the whole record that it was not prejudicial"? (*McCandless v. United States* (1935), 298 U. S. 342, 347-348, 80 L. Ed. 1205, 1209.)

If so, we respectfully submit that certiorari should be granted as prayed, to the end that defendant-respondent be called upon to sustain the burden of showing that the error was not prejudicial.

Under this view, it seemed to us to be unnecessary to set forth either in the foregoing petition or in this brief any summary of the evidence relied on by us as showing the existence of jury questions in the record. However, caution impelled us to cite in the petition under Point III enough of the evidence relied upon by petitioner to show that his case is not devoid of supporting proof, as might be inferred on a mere reading of the opinons of the courts below.

We respectfully suggest that something much broader and more important than petitioner's personal interest is involved in his petition.

There is involved the fundamental rights of every litigant who demands a jury trial, and an interpretation of the Seventh Amendment on a point not yet settled by this Court.

There is also involved a question of orderly trial procedure bearing upon the right of this Court and of the Circuit Courts of Appeals to be immunized against being required to speculate upon what a jury that was never called or assembled could have found upon the basis of voluminous evidence involving the credibility of witnesses and the weighing of conflicting testimony.

We respectfully submit there should be a summary reversal of the judgment appealed from, with an order for a new trial, on the same ground and reasoning as were adopted in *Hanson v. Carlblom* (1904), 13 N. D. 361, 100 N. W. 1084, and *Kilgore v. Farmers Union Oil Co.* (1946), 24 N. D. 640, 24 N. W. (2d) 26:

> "We are unable to retry the case, and for reasons which are fundamental. The action is at law for the recovery of money only, and was triable to a jury as a matter of strict legal right. The answer presents no equitable issues whatever. The statement of case shows that the defendant demanded a jury trial. This he was entitled to, and his right thereto was not waived. On the contrary, it was insisted upon in the district court, and is again urged in this court. Upon this state of facts the trial court has no authority of law to try the case without a jury, and for the same reason this court is also without authority to enter upon a retrial."

The petition should be granted.

Respectfully submitted,

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